FILED OCT 28 1963
No. 91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JOHN WILEY & SONS, INC.,

Petitioner

v.

DAVID LIVINGSTON, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief *amicus curiae* in this case in support of respondent, as provided in Rule 42 of the Rules of this Court. The consent of the attorneys for the respondent has been obtained. The consent of the attorneys for the petitioner was requested but refused.

The AFL-CIO is a federation of labor unions, having a total membership of approximately thirteen million. Respondent in this case represents a district of an international union affiliated with the Federation.

The case involves two issues, not heretofore decided by this Court, which are of great importance to the entire labor movement. First, in what situations and to what extent does a collective bargaining agreement survive a change in the ownership or control of the business enterprise? Second,

what is the proper allocation of responsibilities between court and arbitrator when a party to a collective bargaining agreement resists arbitration on the ground that the other party has failed to comply with the agreement's procedures for processing grievances?

The parties to this action necessarily will concentrate on the peculiar facts of their case. In the brief tendered with this motion, the AFL-CIO discusses the issues in broader terms, highlighting their potential impact upon myriad related situations which recur frequently in the field of labor relations.

Respectfully submitted,

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INTRODUCTION AND STATEMENT OF INTEREST

This case presents a situation which is in many respects familiar to this Court. A union claims that employees are entitled to certain rights and benefits under a collective bargaining agreement. The employer disagrees. The agreement provides a grievance and arbitration procedure "as the sole means of obtaining adjustment" of any dispute "arising out of or relating to this agreement, or its interpretation or application, or enforcement." The employer, however, refuses to submit the dispute to arbitration. By an action under Section 301 of the Labor Management Relations Act the union seeks to compel the employer to arbitrate.

The sole question presented is whether the employer is obliged to arbitrate the underlying dispute with the union. The merits of that underlying dispute are not before the Court. The union has not asked this Court—or any court—to determine whether the employees are entitled to the seniority, pension, severance-pay, vacation, and other bene-

fits which the union claims. It asks only that the question be determined in accordance with the arbitration provision of the agreement.

Since the union here claims that the employees are entitled to these benefits under the agreement, there can be no question that the underlying dispute in this case is one "arising out of or relating to this agreement, its interpretation or application." Petitioner devotes 14 pages of its brief (pp. 30-44) to arguing that the agreement does not provide for the benefits which the union seeks, and that the assertion that it does is "frivolous." This argument need not detain us, however, since this Court has already authoritatively decided that when an arbitration clause of a collective agreement provides for arbitration of disputes concerning its application and interpretation, any claim by the union that the agreement has been violated is subject to arbitration, regardless how foolish or even frivolous that claim might appear to be. *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960).

This case presents additional issues, however, which have not previously been decided by this Court, and which are of far-reaching importance to the federal labor policy.

The first issue is whether the defendant in this case, John Wiley & Sons, Inc., is bound by the agreement which the union seeks to enforce. That agreement was originally executed between the union and Interscience Publishers, Inc. During the term of the agreement, Interscience and Wiley merged, and Wiley is the surviving corporate entity. Although Wiley took over Interscience's business, and continued for a period of time to operate the Interscience plant, it takes the position that on October 2, 1961, the date of the merger, the agreement terminated, even though it would not have terminated by its terms until January 31, 1962. Some time after the corporate merger, Wiley closed the Interscience plant and physically consolidated its operations with another larger Wiley plant.

The union claims that the agreement survived the corporate merger and that Wiley became bound by it when the merger took place. It further claims that, under the agreement, employees became entitled to certain permanent economic benefits and job protections at the time the physical consolidation of the plants took place. Since Wiley refuses to acknowledge these obligations, the union seeks an order compeling Wiley to arbitrate under the grievance and arbitration procedures of the agreement.

In addition to its contention that it is in no way bound by the agreement, Wiley asserts another defense. It argues that the union lost any right which it might otherwise have had to arbitrate its claim by failing to comply with the procedural steps preceding arbitration which are prescribed in the agreement. The issue thus presented is whether, assuming Wiley is bound by the agreement, the court or an arbitrator should decide whether the union failed to comply with these procedural steps, and whether the effect of such noncompliance is forfeiture of its claim.

Each of these issues is of utmost importance to the American labor movement as a whole. The Court's decision on the first question will determine the extent to which the industrial stability which is provided by collective agreements, and the expectations of employees under those agreements, can be upset by a change in ownership or control of the enterprise to which the agreement is applicable. The Court's decision on the second question will determine whether courts or arbitrators will decide the extent to which an employer may refuse to arbitrate a grievance which would otherwise be arbitrable under a collective bargaining agreement, simply because of some procedural objection to the manner in which the grievance was presented or processed.

Because of the vital impact which the decision in this case will have upon all American unions, and indeed upon the institution of collective bargaining itself, the American Federation of Labor and Congress of Industrial Organizations files this brief as *amicus curiae*.

SUMMARY OF ARGUMENT

I

The question of whether Wiley is subject to the collective bargaining agreement between its predecessor, Interscience, and the union must be decided in the light of the federal labor policy. Even though the application of the New York Stock Corporation Law would lead to what we regard as the correct result in this case, a decision by this Court that state corporate law rather than federal labor law is applicable would lead to incongruous results in other cases, and would be in conflict with the well-established principle that federal law governs the enforcement of labor agreements under Section 301.

A. Both courts and commentators have recognized that a collective bargaining agreement is quite different from an ordinary contract. It is a privately created code, negotiated between parties who are required to deal with each other in accordance with procedures required by the National Labor Relations Act. It regulates the industrial community for its term and binds all employees who become members of that community. Once executed, it is binding upon all employees in the bargaining unit, including those who may not have wished to be represented by the union at all, and those who are hired after the agreement is executed. It cannot, therefore, be regarded as a simple contract binding only upon those who are parties to it in the conventional common-law sense.

B. Although common principles of contract law would dictate that a simple purchaser of a business would not be bound by any contract made by the seller which the purchaser does not expressly assume, this rule should not be applied to collective bargaining agreements. Rather, the collective bargaining agreement should be regarded as continuing to regulate the industrial community for which it was designed so long as that community continues in existence, irrespective of changes in ownership. Change in the identity of the owner should be treated no differently

than changes in the identity of employees. Both new owners and new employees should be held to accept the agreement as a condition of entering the industrial community which the agreement governs. This rule is fair to all parties and is the only one which would promote the stability and peace in industrial relations which is the objective of federal labor policy.

This does not mean, of course, that any purchaser of the assets of a business becomes bound by the collective bargaining agreement applicable to that business. The agreement attaches to the industrial community, not the physical assets as such. The question of whether the industrial community has survived a change in ownership must be resolved on the basis of all the facts and circumstances of each case, in much the same way as the NLRB determines whether a new owner is bound to recognize and bargain with the union which represented the employees prior to a change in ownership or control.

C. When a change in ownership is accomplished by a corporate merger or consolidation, or a purchase of stock, the new owner necessarily acquires the business as a whole. In that type of situation, therefore, the existing agreement should be regarded as binding on the new owner, not because he is the legal successor of the prior owner for other contracts, but because merger is a form of acquiring ownership of a business without affecting the pre-existing industrial community governed by the collective agreement.

D. The fact that, some time after the corporate merger, Wiley physically moved the former Interscience operations to another plant has no bearing on the question of whether Wiley is bound by the agreement. Wiley became bound by the agreement when it acquired the Interscience plant. The subsequent physical change in the operations raises the same question which would have been raised had Interscience itself taken that action: whether the employees are entitled to any rights and benefits under the agreement after that physical change takes place. That is a question of inter-

pretation and application of the agreement, and is to be decided by the arbitrator, not the court.

Similarly, the fact that the agreement expired on January 31, 1962—after the merger had taken place—is totally irrelevant to the question before this Court. The agreement was in effect when Wiley acquired the business, and the union claims that certain permanent rights accrued to employees before the agreement terminated. The merits of the union's claim are for the arbitrator, not the court.

Finally, the company's contention that the union lacks standing to enforce the agreement because it is no longer the bargaining agent of the employees is totally lacking in merit. The union's standing derives not from its status as statutory bargaining agent, but from an agreement which provides that disputes concerning its interpretation and application are to be resolved through arbitration between the union and the employer.

II

The question of whether the union lost whatever right it might have to arbitrate the dispute because it did not follow exactly the procedures specified in the grievance machinery is one which should be decided by the arbitrator, not the court. We urge this conclusion not as a matter of law, but as a matter of contract interpretation. It is the almost universal expectation of parties to collective agreements that procedural questions are for the arbitrator. Accordingly, this Court should construe such agreements to reach that result unless the opposite conclusion is compelled by specific language.

In determining the parties' intentions as to the tribunal for deciding procedural questions, this Court must consider the factors which would enter into the parties' choice.

The first factor to be considered is the relative competence of arbitrators and courts to pass upon procedural defenses. When a procedural defense is tendered, there are four questions which must be decided: (1) has there been a deviation

from contractual procedures; (2) is the deviation one which may be "excused"; (3) if not excused, is the consequence of the deviation to be loss of the grievance; (4) even if the grievance is lost on procedural grounds, will it effectuate application of the agreement to render an advisory opinion on the merits, to guide the parties in similar situations in the future? It is clear that the arbitrator is better qualified than the court to answer each of these questions.

The first two questions, relating to the meaning of the agreement, require a familiarity with practices at this plant, a knowledge and understanding of the way the grievance machinery is administered, and an appreciation of the role which procedures are intended to play in resolving grievances disputes.

The third and fourth questions relate to the remedy for noncompliance with procedural rules. This Court has already recognized that the arbitrator's skill and flexibility in formulating remedies are principal reasons why parties choose them, rather than courts, to settle their disputes. If courts were to resolve procedural defenses, the sole remedy for procedural noncompliance would be denial of arbitration. But, as we show, arbitrators frequently fashion other remedies which better effectuate the purposes of the agreement.

Another factor impelling parties to submit procedural disputes to their arbitrators is the slowness of the judicial procedure. The essential attribute of any grievance machinery is that it provide speedy resolution of disputes. Submission of procedural disputes to courts would bring about multiennial delays in the processing of grievances.

Actual experience demonstrates what the above-described considerations would suggest: that parties to collective bargaining agreements do in fact submit their procedural disputes to arbitrators, rather than courts. There have been literally thousands of procedural determinations by arbitrators, as compared with but a few dozen by the courts. For these reasons we urge, with Professor (now Solicitor

General) Cox, that the conventional arbitration clause—typified by the one in this case—which provides for arbitration of all questions of interpretation and application of the agreement should be construed as expressing an intention that procedural defenses to otherwise arbitrable grievances are to be determined by the arbitrator, not the courts.

ARGUMENT

I—NEITHER THE CORPORATE CONSOLIDATION OF INTERSCIENCE AND WILEY NOR THE PHYSICAL CONSOLIDATION OF THEIR PLANTS PRECLUDES ARBITRATION OF THE UNION'S CLAIM

A basic and recurring problem in the law of labor relations is the problem of determining the rights and obligations of the parties when an employer closes, sells or moves his plant, changes the nature of his business, combines separate operations into one, or changes his corporate structure. In our dynamic economy, particularly in this period of rapid technological change, events of this kind are becoming more and more common.

This case presents only one facet of the problem, in one particular factual context.

It cannot, however, be considered in a vacuum. Since this Court has held that "the substantive law to apply in suits under §301(a) is federal law, which the courts must fashion from the policy of our national labor laws," *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 456 (1957), the issues presented must be analyzed in terms of the labor relations context in which they arise, and decided in the light of the federal labor policy. And that policy cannot be determined without looking, at least out of the corner of one eye, at similar, but different situations than the one actually presented here.

For example, it is possible to decide this case against petitioner simply on the ground that Section 90 of the New York

Stock Corporation Law makes a corporation formed by consolidation liable upon the obligations of the constituent corporations "as if such consolidated corporation had itself incurred such liabilities or obligations." Although this would, we believe, produce the correct result in this case, we believe, as did the court below, that this statute is not controlling. As we shall see, to treat a collective bargaining agreement in the same way as a commercial contract would tend to lead to wholly incongruous results in other situations. "The principles determining legal rights and duties under a collective bargaining agreement should not be imposed from above; they should be drawn out of the institutions of labor relations and shaped to their needs." Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 604 (1956).

A. The Collective Bargaining Agreement as a Regulatory Code Governing the Industrial Community.

It is a commonplace that collective bargaining agreements are a unique legal phenomenon—not simply another form of contract. As Professor (now Solicitor General) Cox has said, "'A rose is a rose is a rose.' So is a collective bargaining agreement." *Id.* at 601. And Professor Clyde Summers has observed:

> "The collective agreement differs as much from the common contract as Humpty Dumpty differs from a common egg. The failure of the courts to see and remember the differences causes confusion and leads them to blunder. They misconceive the relationship, hobble arbitration, and misinterpret the agreement, and defeat the intent of the parties—all because they forget they are in a world quite unlike their own." Summers, *Judicial Review of Labor Arbitration*, 2 Buff. L. Rev. 1, 17-18 (1952). See also Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1 (1958); Chamberlin, *Collective Bargaining and the Concept of Contract*, 48 Colum. L. Rev. 829 (1948).

To say that the collective bargaining agreement is not an ordinary contract is not to say that all principles of contract law are necessarily inapplicable, but only that they are not automatically applicable. To determine which contract principles should be applied to collective bargaining agreements and which should not, it is necessary to understand the nature and function of the collective agreement.

As this Court has acknowledged, "a collective bargaining agreement is an effort to erect a system of industrial self-government." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, 580 (1960). It is a set of rules, established by the employer and the union in accordance with procedures prescribed by the National Labor Relations Act, governing the bargaining unit—the industrial community.

These rules regulate the day-to-day affairs of that community. They prescribe not only the rates of pay and other economic benefits to be provided to employees, but the times at which employees report to or leave work, the time at which they have lunch or relief breaks, the grounds upon which they may be discharged or disciplined, etc. Many of the rules established in a collective agreement govern the relationship between individual employees as well as between employees and the employer. For example, the agreement normally provides rules and procedures for determining which employees will be laid off when there is a reduction in the work force, which employee will be promoted when a vacancy occurs, which employee will have preference in selecting the period for his vacation, which shall be required to work overtime, or on the less desirable shifts, or on holidays.

Although in some aspects the collective bargaining agreement does represent an exchange of promises between the two parties—the union and employer—its primary function is to establish the rules governing the employee-employer relationship. And these rules are binding upon the employees not by virtue of principles of contract law, but by virtue

of the federal labor laws. Although it is common to describe the union as the "agent" of the employees, it is obviously not an agent in the usual sense. Once a union is selected by the majority of employees in a bargaining unit, it has authority to bind *all* employees, including those who do not wish to be represented in the establishment of the rules. In addition, all employees who are hired after the execution of the agreement, and who have had no voice either in selecting the union or in the negotiation or ratification of the agreement, are also bound. Moreover, no individual employee has the right to make a private agreement with the employer, and any such agreement is void. *J. I. Case Co.* v. *NLRB*, 321 U. S. 332 (1944).

Viewed from the standpoint of conventional contract law, these conclusions make no sense. Conventional contract law is not, however, the source from which they were derived, or the standard by which they are to be judged. Rather, these principles derive from and are designed to implement the policies of the federal labor law. Their purpose is to promote industrial peace by establishing an orderly and democratic system of labor-management relations pursuant to the statutory mandate that wages, hours and working conditions be established by collective bargaining when the employees so elect.

In short, the collective bargaining agreement is not a simple contract, binding only upon those who can be said to be parties to it in the conventional, common-law sense. It is, rather, a privately created code, established by negotiation between union and management, regulating the industrial community for its term. As this Court said in the *Case* case: "Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service . . . which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established." 321 U. S. at 335.

This code, or schedule, or whatever it be called, is established pursuant to the National Labor Relations Act. It is that Act which governs and indeed requires the collective bargaining procedures by which that code is created, and which provides the legal sanctions which make it binding and enforceable. In order to determine who is bound by that code, and under what circumstances, it is necessary therefore to look not to the law of contracts, but to the principles and policies of the federal labor law.

B. Change in Ownership, Without More, Does Not Terminate the Rules Set Forth in a Collective Bargaining Agreement.

We take, first, the simplest case in which the question in this case can arise. Does the mere fact of a change in ownership of a business enterprise terminate a collective bargaining agreement? Management and union have, through the process of bargaining, hammered out a set of rules which will govern employment for, say, 2 years. Shortly thereafter the business is sold—lock, stock and barrel. The new owner takes over everything—the physical plant, the contracts with customers, the trade name, the accounts receivable, the good will. He is carrying on the same business in the same way at the same stand. But, he specifies, he is not assuming the collective bargaining agreement.

What, under these circumstances, is the status of that agreement? Conventional contract principles would assert that it has terminated, at least insofar as it pertains to the plant that has been sold. The new owner is not a party to the contract and hence cannot be said to be bound. And this is, in fact, what the courts which had occasion to consider the question have generally held.[1] But see *Polaner* v.

[1] *Gold* v. *Gibbons*, 178 Cal. App. 2d 517 (1960); *Tarr* v. *Street Ry. Employees*, 73 Ida. 223, 250 P. 2d 904 (1952); *Robertson* v. *Midland Windsor, Inc.*, 116 N. Y. S. 2d 544 (Sup. Ct. 1952); *International Ass'n of Machinists* v. *Falstaff Brewing Co.*, 328 S. W. 2d 778 (Tex. App. 1959); *Livingston* v. *Gindoff Textile Corp.*, 191 F. Supp. 135 (S.D. N.Y. 1961); *In re Livingston*, 223 N. Y. S. 2d 968 (Sup. Ct. 1961).

Gold Medal Grill, 117 N. E. 2d 62 (Ohio Com. Pleas 1951). Of course, if the transfer of ownership is accomplished by sale of the stock of the contracting company—as is often the case—the result would be different. Since the contracting entity remains, there is "privity of contract" and the collective bargaining agreement remains in effect.

It is our view that these results, indicated by conventional contract law, are nonsense in terms of the law to which reference should properly be made—the federal labor law. It is our contention that the collective bargaining agreement should be regarded as continuing to regulate the industrial community for which it was designed so long as that community continues in existence, irrespective of any change in ownership.

It might, at first glance, appear radical to urge that a purchaser is bound by a collective bargaining agreement to which he never consented. Upon reflection, however, it becomes apparent that a collective bargaining agreement is not a consensual arrangement in the way that other agreements are. When an employer hires its employees, he is prohibited by law from selecting them on the basis of their membership or nonmembership in a labor organization. National Labor Relations Act §8(a)(3), 29 U.S.C. §158 (a)(3). Thus, he cannot avoid entering into the agreement by careful selection of his employees. And when a union demonstrates that it represents a majority of those employees, the employer has no choice as to whether or not to negotiate with that union. He is required by law not only to meet with and talk to the union, but to make a sincere effort to reach an agreement. *Id.* §8(a)(5), 29 U.S.C. 158 (a)(5). See generally Cox, *The Duty to Bargain in Good Faith,* 71 Harv. L. Rev. 1401 (1958).

It is thus plain that there is nothing consensual about the relationship between the parties. They are by law required to deal with each other, and to attempt to reach an

agreement. An employer may not even go out of business for the purpose of avoiding his statutory obligation to bargain with the majority representative of his employees. See *Darlington Mfg. Co.*, 139 N.L.R.B. 241 (1962).

The "agreement" which emerges from this type of non-voluntary relationship cannot be termed "consensual" in the usual sense. In no other context, so far as we are aware, does the law say to private citizens, "you must sit down together and make a sincere effort to reach a *modus vivendi*, and you must reduce your agreement to writing."

It is, we believe, no more radical to hold that a purchaser of a business is bound by the agreement than it is to hold that subsequently hired employees are bound by it. Both are strangers to the agreement when made. But both should be held to accept the agreement as the rule of the community as a condition of their entrance into it. This result is, we believe, necessary if collective bargaining is to perform its statutory purpose.

It should not be assumed that this conclusion is a one-sided one. Orderly and peaceful labor relations are, after all, a benefit to the employer as well as the employees and the public. If the agreement were not binding on the new employer, it would also not be binding upon the union and the employees. A purchaser of a business would then have no assurance that the union would not seek to obtain more costly terms and conditions of employment from him than it had settled for with his predecessor. On the other hand, if the agreement automatically continues in effect, he is assured that he will be free of "labor trouble," and that he will be able to operate the business with the same labor costs as his predecessor.

But the most important consideration of all, of course, is that any other result would be destructive of the most fundamental purpose of the federal labor laws—to promote indus-

trial peace. If a change in the ownership of a business is held to have the effect of terminating the existing collective bargaining agreement, then obviously the new owner and the union must immediately proceed to negotiate a new one. It is almost inevitable, in that situation, that one party or the other will urge that the terms of the pre-existing contract be adopted as the new one. If the other party—employer or union—seeks terms more favorable to it than those which previously existed, a strike is almost inevitable. Surely a union, representing employees who are performing the same jobs in the same enterprise, is not going to submit voluntarily to a reduction in the standards which it had negotiated with the prior owner. Similarly, a new owner is not voluntarily going to agree to terms and conditions of employment more burdensome than those which the union previously accepted—and indeed by which the union would still be bound but for the fortuity of the sale.

In other words, either party would consider it outrageously unfair for the other to attempt to gain an advantage simply because of a change in ownership of the business. This reaction occurs, of course, because the collective agreement is not simply a bilateral arrangement binding only on its signatories, but a code of rules which are expected to govern the industrial community for the term of the agreement. Since this is what the agreement is in fact, this is how it should be treated in law.

Indeed, in other contexts the law does treat the agreement this way. We have already seen that the agreement is binding on all employees, even those who neither authorized the union to represent them in the first instance nor ratified the agreement after it is made. Similarly, the so-called "contract bar" rules of the NLRB also treat the agreement as a code binding for its term, by prohibiting the employees from selecting a new bargaining representative during the term

of the agreement,[2] This rule, which is not to be found in the statute, was promulgated by the Board in order to promote the stability in industrial relations which the Act was intended to foster.[3]

We submit that the federal courts should similarly promote the policies of the act, fulfill the expectations of the parties, and carry out the nature and function of collective bargaining agreements by holding that they are binding on the industrial community to which they are applicable, irrespective of changes in ownership or control. As the Sixth Circuit has said in a different but not unrelated context: "It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace. . . . It needs no demonstration that the strife which is sought to be averted is no less an object of legislative solicitude when contract, death, or operation of law brings about change of ownership in the employing agency." *NLRB* v. *Colten*, 105 F. 2d 179, 183 (6th Cir. 1939).

Obviously, this does not mean that any purchaser of the assets of a business becomes bound by the collective agreement. Suppose, for example, that the assets of a business are sold to an auction company, for the purpose not of operating

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[2] Until recently, the contract-bar rule was applicable only to the first two years of the term of a collective agreement. Recently, the Board extended the bar period to three years, in order to "introduce insofar as our contract bar rules may do so, a greater measure of stability of labor relations into our industrial communities as a whole to help stabilize in turn our present American economy." *General Cable Corp.*, 139 N.L.R.B. 1123, 1125 (1962).

[3] Somewhat inconsistently, the Board has held that if a representation election is held at the end of the bar period, but during the term of an existing agreement, the agreement will not be binding upon a new representative if one is elected. *American Seating Co.*, 106 N.L.R.B. 250 (1953). It has been very ably argued, by a management attorney, that the new representative should continue to be bound by any existing collective bargaining agreement. Freidin, *The Board, the "Bar," and the Bargain*, 59 Colum. L. Rev. 61, 82 (1959).

the enterprise but dismantling it and selling the pieces on the open market. In that situation, of course, the auction company would acquire no obligations under the agreement. It has not purchased a business, it has purchased only some equipment, real estate, and other tangible assets.

There are, of course, an infinite number of possible situations which fall somewhere between these two extremes. Each case must be decided by an examination of all the facts and circumstances, in order to determine whether the industrial community has remained substantially intact, or whether the change in ownership has been accompanied by so many other changes in the nature of the enterprise that the industrial community cannot be said to have survived.

There is no litmus paper test by which this determination can be made. There is, however, a substantial body of law to which the courts may look for guidance in determining whether the industrial community has survived. This is the law which the NLRB has developed in cases involving the question of whether a new employer is obliged to recognize the pre-existing bargaining agent after a transfer of the ownership of the business. The rule which the Board has established in these cases is that "where . . . no essential attribute of the employment relationship has been changed as a result of the transfer, the certification [of a bargaining agent] continues with undiminished vitality to represent the will of the employees with respect to their choice of a bargaining agent, and the consequent obligation to bargain subsists notwithstanding the change in the legal ownership of the business enterprise." *Stonewall Cotton Mills*, 80 N.L.R.B. 325, 327 (1948). In determining whether any "essential attribute of the employment relationship has been changed as a result of the transfer," the Board has looked at all the facts and circumstances to determine whether basically the same business is being operated in

basically the same way.[4] The theory of the Board cases is that the right of a union to be recognized as the bargaining agent of a unit of employees is in no way affected merely by a change in employers. Thus, so long as there is no other substantial change in the business except the change in ownership, the Board has held that the new owner is under the same obligation as his predecessor to bargain with the incumbent union.[5] This is essentially the same test which, we believe, should be applied in determining whether the new owner is bound by an existing collective bargaining agreement.[6]

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[4] *Johnson Ready Mix Co.*, 142 N.L.R.B. No. 50, 53 L.R.R.M. 1068 (1963); *Downtown Bakery Corp.*, 139 N.L.R.B. 1352 (1962); *Quality Coal Corp.*, 139 N.L.R.B. 492 (1962), *enforced*, 53 LRRM 2559 (7th Cir. 1963), *McFarland & Hullinger*, 131 N.L.R.B. 745 (1961), *enforced*, 306 F. 2d 219 (10th Cir. 1962); *John Stepp's Friendly Ford, Inc.*, 141 N.L.R.B. No. 94, 52 L.R.R.M. 1434 (1963); *Elm City Broadcasting Corp.*, 116 N.L.R.B. 1670 (1956); *Butler Chemical Co.*, 116 N.L.R.B. 1041 (1956); *Lunder Shoe Corp.*, 103 N.L.R.B. 1322 (1953), *enforced* 211 F. 2d 284 (1st Cir. 1954); *Krantz Wire & Mfg. Co.*, 97 N.L.R.B. 971 (1952); *enforced sub. nom NLRB* v. *Armato*, 199 F. 2d 800 (7th Cir. 1952); *Auto Ventshade, Inc.*, 123 N.L.R.B. 451 (1959), *enforced*, 276 F. 2d 303 (5th Cir. 1960); *Alamo White Truck Service, Inc.*, 122 N.L.R.B. 1174 (1959), *reversed*, 273 F. 2d 241 (5th Cir. 1959).

[5] The issue in the Board cases, of course, is not whether the agreement survives the transfer but whether the union's representative status survives. The Board has generally taken what we believe to be the erroneous view that unless the new owner is the *alter ego* of the previous one, he is not bound by the pre-existing agreement. Compare *M. B. Farrin Lumber Co.*, 117 N.L.R.B. 575 (1957) (contract binding because transfer of ownership accomplished by sale of stock), *with Jolly Giant Lumber Co.*, 114 N.L.R.B. 413 (1955); *Southwestern Greyhound Lines Inc.*, 112 N.L.R.B. 1014 (1955); *American Concrete Pipe Inc.*, 128 N.L.R.B. 720 (1960) (holding new owner not bound by prior contract because he acquired business through purchase of assets).

[6] We do not mean to suggest that the question of whether the union's representative status survives a change in ownership is exactly the same question as whether an existing collective bargaining agreement survives. One test which the Board applies in answering the first ques-

C. When a Change in Ownership Is Accomplished by Corporate Merger or Consolidation, or a Sale of Stock, the Industrial Community Necessarily Survives the Change, and the Collective Bargaining Agreement Therefore Continues to Apply.

When a change in ownership is accomplished by a corporate merger, consolidation, or sale of corporate stock, it is clear that that change, *in itself*, has absolutely no effect on the industrial community. The entire business enterprise is exactly the same the day after such an event as it was the day before. That being the case, the agreement is just as applicable to that enterprise after the event as it was before.

We thus reach the same conclusion urged by the union in this case, but by a somewhat different route. The union's argument is based on the theory that Wiley, having merged with Interscience, is under New York law the legal successor to Interscience's obligations. Under this approach, a different result would be reached if Wiley had simply purchased the assets of Interscience. Our argument, on the other hand, is that the question is not whether the new owner is a legal successor for other purposes, but whether it is the successor for collective bargaining purposes. That question is to be resolved, in our view, on the basis of determining whether the new owner has taken over the entire

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tion, for example, is whether there has been any substantial change in the identity of the employees. Obviously, that question cannot itself be relevant in determining whether the agreement survives, since if the new owner is bound by the agreement he would not be permitted to replace the old employees with new ones except in accordance with the agreement.

Similarly, the Board on occasion has held that a new owner need not recognize the union because there is a basis for a good-faith doubt that the union still represents a majority of the employees. E.g., *Diamond National Corp.*, 133 N.L.R.B. 268 (1961); *Mitchell Standard Corp.*, 140 N.L.R.B. No. 44, 52 L.R.R.M. 1049 (1963). This consideration should not be a basis for permitting the new owner to avoid the existing agreement any more than it would be a basis for permitting the original owner to do so. See *Montgomery Ward & Co.*, 137 N.L.R.B. 346 (1962).

business enterprise, without affecting the industrial community to which the existing collective bargaining agreement is applicable. The significance of the fact that the two corporations merged, in that view, is that it necessarily means that Wiley took over the existing Interscience business as a whole, without any effect on the industrial community governed by the existing collective bargaining agreement.

The company in this case appears to concur in the view that a simple change in ownership, whether through a purchase of assets or a corporate merger, does not in itself affect either an existing collective bargaining relationship or an existing collective bargaining agreement. In its brief, at pp. 26-27, the company says:

> "Whether the 'successor' is a successor by merger, as here, or a successor through purchase or reorganization or otherwise, is a technicality of no importance to those concerned with the bargaining unit. And those concerned with the bargaining unit, management as well as labor, are equally indifferent whether the question arises, as here, in an action to enforce a collective bargaining contract or in a representation proceeding or a proceeding to enforce bargaining rights before the National Labor Relations Board.
>
> "What is of basic importance to the parties is whether the bargaining unit continues in existence, and if so whether the employing enterprise, regardless of its ownership, remains basically the same.
>
> "If these conditions continue, the collective bargaining relationship and all that it implies, including the adjunctive remedy of arbitration, continues as before. If the conditions no longer exist, the collective bargaining relationship and the adjunctive remedies, including arbitration, are no longer appropriate." (Pet. Br. 26-27)

The company's essential argument thus appears to be that it was not the merger, but the physical consolidation of the plants, which had the effect of terminating the agreement. As we shall demonstrate, however, this physical change, which took place subsequent to the merger, has no bearing whatever on the issue to be decided by the Court in this case.

D. The Events Which Took Place Subsequent to the Merger Cannot Eliminate the Union's Right to Arbitrate the Claims Involved in This Case.

On October 2, 1961, "the certificate of consolidation of Wiley was actually filed in the Secretary of State's office" (R. 55). On that date Interscience disappeared as a corporate entity and Wiley succeeded to ownership of the industrial enterprise formerly conducted by Interscience at 250 Park Avenue. So far as the record discloses, that is all that happened. The plant was not moved. There was no physical consolidation with the Wiley plant. Literally, nothing changed but the ownership and the management of the enterprise.

Wiley, nevertheless, took the position that as of 9:00 a.m. on October 2, 1961, the collective bargaining agreement terminated. It sent letters to the employees and to the union setting forth its view that both the agreement and the collective bargaining relationship with the union had ended because of the merger. This was in accordance with its position, which had previously been made clear to the union, that as of the date of the corporate merger the union would become "*functus officio.*" (R. 75)

The company's attempt to justify its action on the basis of the physical integration of the Interscience and Wiley operations confuses what are, both conceptually and factually, two separate questions: (1) who is bound by the agreement, and (2) what the agreement means. The question as to whether Wiley is bound by the agreement is posed by the merger, and by the merger only. The physical integration

of the two plants gives rise to the very difficult questions which the union is seeking to arbitrate—*i.e.*, whether the workers at the former Interscience plant have rights at the Wiley plant, and if so, what those rights are. But these questions are questions as to what the agreement means, not questions as to who is bound by the agreement. And once it is decided that Wiley is bound by the agreement, the question of what obligations, if any, it has under the agreement upon the physical integration of the two plants is a question for the arbitrator, not the court, to decide.

It happens that in this case the conceptual error is illustrated by the actual sequence of events. The company's argument implicitly assumes, as the court below seemed to assume, that the merger and the physical transfer took place at the same time. In fact, they did not. For at least some period of time after October 2, 1961, there was no physical change at Interscience: the same work was performed by the same workers at the same plant in the same way.[7]

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[7] The contrary factual assumption by the court below may have been the result of the company's conceptual confusion in argument. The opinion states (R. 90) that "on September 21, 1961, Interscience wrote its employees . . . offering jobs at the Wiley plant in New York City." This letter of September 21 was Respondent's Exhibit 5 in the trial court (R. 60, 78) but was not printed in the joint appendix in the court of appeals. It was, however, printed in the company's brief in that court. It said, in part:

> "The merger . . . will take place on Monday, October 2, 1961. . . . [B]efore long, when suitable quarters have been arranged, you will change your place of work from Fifth Avenue and 28th Street to Fourth Avenue and 30th Street. Until the move, work will continue, as now, at these offices. . . . Plans for the move should be completed within a few months."

The only reference in the record to the physical consolidation of the Interscience and Wiley operations is in the affidavit of Al Turbane, the union organizer, which was filed in March, 1962 (R. 61). It appears from the discussion of the physical conditions of the work in that affidavit (R. 66) that the consolidation had taken place by that time.

This fact serves merely to emphasize what is and what is not in issue here. The only question to be decided by this Court is whether Wiley became bound to the existing collective bargaining agreement when it acquired the Interscience plant. If it did, then it was obliged to give to the employees whatever rights and benefits the agreement entitled them to. Whether the agreement provides *any* rights or benefits upon the physical consolidation of the plants is an entirely separate question, and is for the arbitrator, not the Court to decide.

Suppose, for example, that Interscience had purchased the Wiley plant, and then moved its operations to that plant. In that event, the union would be asking Interscience to arbitrate the very claims which it is here asking Wiley to arbitrate. There would be, under such circumstances, very difficult problems as to the continuation of employee rights upon the plant move. See *Zdanok* v. *Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961), *affirmed*, 370 U. S. 530 (1962). But those questions would be questions of interpretation of the agreement, not questions as to who is bound by the agreement.

Surely, the parties *may* provide, in a collective bargaining agreement, that employees will be entitled to certain job rights, financial benefits, and other protections in the event of a consolidation of their plant with another. See *In re District 2, Marine Engineers*, 233 N. Y. S. 2d 408 (Sup. Ct. 1962). The union in this case claims that this is what the parties *did* provide in their agreement. Plainly, if that claim were being asserted against Interscience, it would be subject to arbitration. See, *e.g.*, *Package Drivers Local 396* v. *Hearst Publishing Co.*, 195 F. Supp. 180 (S.D. Calif. 1962). The arbitrator might decide that the agreement does not provide the rights which the union claims, but there can be no question that the union would be entitled to have an arbitrator's decision on that question.

It is only by confusing the question of who is bound by

the agreement with the question of what the agreement means that the company makes this case appear to be difficult. As to the first question, we have suggested that the rule should be that a new owner is bound whenever he takes over, essentially intact, an existing enterprise, or industrial community, to which the agreement applies. On this analysis, Wiley is bound by the existing collective bargaining agreement because by merging with Interscience it necessarily took over the entire enterprise as a whole. Indeed, for a period of time after the merger, Wiley continued to operate the Interscience plant. The second question, which is raised by the subsequent physical consolidation of the plants, is not whether Wiley thereby ceased to be bound by the agreement, but whether it ceased to have any continuing obligations under the agreement. That is a difficult question, but it is one which is to be resolved by the arbitrator, not the Court.

The same answer will suffice for the contention that, since the agreement expired by its terms on January 31, 1962, Wiley cannot thereafter have any continuing obligations under that agreement. The union here is seeking to enforce rights which it claims became "vested" before the expiration of the agreement. In other words, the union contends that the agreement provided certain permanent benefits to employees which the expiration of the agreement does not affect. These benefits include the right to be laid off, promoted, or recalled on the basis of seniority and to be protected by the other job-security provisions of the agreement so long as they are employed, the right to receive annual vacations in accordance with the agreement so long as they were employed, the right to continue to be covered by the "65 Security Plan" so long as they were employed, and the right to severance pay in accordance with the agreement when their employment terminates. Whether rights of this character can be said to be vested is a difficult question. *Cf. Zdanok* v. *Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961), *af-*

firmed, 370 U. S. 530 (1962). The union's claim that they are vested, however, certainly raises a question concerning the interpretation and application of the agreement which is subject to arbitration even though the agreement under which the question arises has since expired.

This is not a case like *Procter & Gamble Ind. Union* v. *Procter & Gamble Mfg. Co.,* 312 F. 2d 181 (2d Cir. 1962), *cert. denied,* 374 U. S. 830 (1963) in which the union's claim that the company violated the agreement was based on the premise that the agreement had in fact not terminated. In the present case, the union concedes that the agreement has expired, but contends that the agreement entitled employees who were covered by it during its term to certain permanent rights. In principle, the case is no different than one in which a union claims that an employee was discharged in violation of the agreement during its term, and seeks to arbitrate that claim after the agreement itself has expired. In *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U. S. 593 (1960), this Court enforced an arbitrator's award which held in effect that an employee improperly discharged during the term of the agreement had a "vested" right to be reinstated even though the agreement had since expired. Similarly, in the present case, the union claims that employees who worked under the agreement during its term thereby became entitled to certain "vested" rights which are not affected by the expiration of the agreement.

The company's argument that the union has no standing because it is no longer the statutory bargaining representative of the employees is equally without merit. The union is not asking the court to give it the status of exclusive representative of these employees. It is asking only that the court enforce the terms of an agreement which the union negotiated, and which specifically provides that disputes concerning its interpretation and application shall be resolved through arbitration between the union and the em-

ployer. That agreement would be enforceable by the union even if the union had not been the employees' exclusive bargaining agent at the time the agreement was made. *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962). *A fortiori*, it is enforceable irrespective of whether the union is currently the bargaining representative of the employees involved.

II—THE COMPANY'S "PROCEDURAL" DEFENSES SHOULD BE SUBMITTED TO THE ARBITRATOR FOR RESOLUTION

In the preceding section, we have shown that Wiley should be held bound by the Interscience collective bargaining agreement. It follows that Wiley cannot refuse to arbitrate the union's claim that employees are entitled to certain rights and benefits which accrued to them under that agreement on the ground that it is not a "party" to the agreement.

Wiley has raised another defense, however. In addition to arguing that it is not bound by the agreement at all, it argues that any right which the union might otherwise have had was forfeited by the union's alleged noncompliance with the procedural steps of the grievance procedure. As we will demonstrate, however, the question of whether the union has lost its right to a decision on the merits of its claim because of its failure to follow the specified contractual procedures is a question which should be determined not by this Court but by the arbitrator.

In the *Steelworkers* trilogy,[8] this Court considered the allocation of responsibilities between court and arbitrator when a party sues to compel arbitration of a grievance dispute. Since arbitration is a matter of contract, it was decided that the courts, before ordering arbitration, must determine

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[8] *Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S 593 (1960).

whether the particular grievance dispute is one which the parties have agreed shall be arbitrable:

> "The Congress . . . has by §301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf*, 363 U. S. at 582.

However, since federal labor policy encourages the settlement of labor disputes by agreed-upon arbitration machinery, the court's function is strictly confined to determining whether the subject matter of the grievance dispute is arbitrable:

> "[T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.*, at 582-83.

Here, as we already have shown, the subject matters raised in the union's grievance are of the sort which are arbitrable under the agreement. The parties have surrendered all other means—economic and judicial—for settling the dispute. Thus, insofar as the subject matter is concerned, the *Steelworkers* trilogy dictates that the dispute be arbitrated.

However, the company urges, it has agreed to submit to arbitration only those grievances which have been processed in accordance with the procedural rules set forth in the con-

tract, and the Court must therefore determine whether the union has complied with those rules, just as it must determine arbitrability of the subject matter, before it can direct that arbitration proceed. Since the union, although it engaged in extensive settlement discussions with company representatives, did not do so in accordance with the literal procedures set forth in the agreement, the company urges that no court can direct arbitration.

To sustain the company's contention, this Court must decide two questions in its favor:

> (1) That, contrary to the decision of the court below, questions concerning compliance with the grievance machinery under the agreement are to be resolved by the courts, rather than the arbitrator;
>
> (2) That the union did fail to comply with the grievance machinery, that this noncompliance was not excused, and that the consequence of noncompliance is complete forfeiture of the substantive rights of the union and the individual employees.

In our view the Court need decide only the first of these questions. We believe that this Court must conclude, with the court below, that in this case the procedural questions are for the arbitrator, not the courts. We urge this conclusion not as a matter of law but, consistently with the *Steelworker* trilogy, as a matter of interpretation of the collective bargaining agreement.

We begin, as in *Warrior & Gulf*, with the proposition that parties are free to create, and commit to the courts, whatever barriers they choose to arbitration. Thus, if specific language or "the most forceful evidence of [such] purpose"[8a] demonstrate that the parties intended that the employer need not appear before an arbitrator absent a judicial determination of procedural defenses, the courts necessarily will

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[8a] *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. at 585.

be drawn into an adjudication of those defenses. Contrariwise, if they explicitly provide that the judiciary shall defer to an arbitrator's disposition of such matters, that intention must be respected.

In most cases, as in this case, there is no clear indication in either direction. The question is one of construction. But as we shall show, the almost universal expectation of parties to collective bargaining agreements is that procedural questions will be determined by the arbitrator. For this reason we urge that in the absence of specific evidence that the particular parties before it had a contrary intention, the court should defer such questions to the arbitrator. Paraphrasing *Warrior & Gulf*, 363 U. S. at 582, an order to arbitrate should not be denied on procedural grounds unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that procedural defenses are to be determined by the arbitrator.

This was the view of the court below (R. 101-07).[9] It is also the result reached by every other Circuit which has passed upon the question since the *Steelworkers* trilogy.[10] The only Circuits taking a contrary view are the First and Seventh, and their decisions were rendered prior to this Court's explanation, in the *Steelworkers* trilogy, of the great scope which courts must accord labor arbitrators when the

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[9] See also, *Carey* v. *General Electric Co.*, 315 F. 2d 499 (2d Cir. 1963).

[10] Third Circuit: *Ass'n of Westinghouse Sal. Emp.* v. *Westinghouse Electric Co.*, 283 F. 2d 93, 96 (1960); *International Tel. & Tel. Corp.* v. *Local 400*, 286 F. 2d 329, 332 (1961); *Radio Corporation of America* v. *Ass'n of Professional Engineering Personnel*, 291 F. 2d 105, 110 (1961).

Fifth Circuit: *Deaton Truck Line, Inc.*, v. *Local Union 612*, 314 F. 2d 418, 422 (1962).

Sixth Circuit: *Local 748* v. *Jefferson City Cabinet Co.*, 314 F. 2d 192 (1963).

parties have provided for arbitration of all disputes over interpretation and application of their agreement.[17]

In the present case, there is no evidence that the parties intended to commit resolution of "procedural" questions to the courts. Indeed, they have agreed to commit all questions concerning "interpretation or application" of the agreement to arbitration (R. 27). Accordingly, if our view of the proper rule of construction is correct, resolution of the Company's procedural defenses in this case is the arbitrator's job.

We turn now to an examination of the reasons why we believe the Court should adopt such a rule. We begin with a discussion of the purpose which is served by the grievance machinery.

A. The Nature of the Grievance Machinery.

The collective bargaining agreement is, as we have seen, a complex "code" regulating virtually every aspect of the employment relationship. It is inevitable that disputes will arise, often in great number, concerning its interpretation and application. But it is not inevitable that each such dispute be submitted to arbitration. Indeed, the system of industrial self-government created by the collective bargaining agreement could not operate if every dispute which arose were arbitrated. Arbitration is reserved for those disputes which cannot be resolved by the parties, after they have had an opportunity to consider and reconsider their positions at various levels and to make adjustments and compromises

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[11] *Boston Mutual Life Insurance Co.* v. *Insurance Agents*, 258 F. 2d 516 (1st Cir. 1958); *Brass & Copper Workers* v. *American Brass Co.*, 272 F. 2d 849 (7th Cir. 1959), *cert. denied*, 363 U. S. 845 (1960). Subsequent to the *Steelworkers* trilogy a district court within the First Circuit rejected a procedural defense outright, and the First Circuit affirmed without opinion. *General Tire & Rubber Co.* v. *Local 512*, 191 F. Supp. 911 (D.R.I.), *aff'd* 294 F. 2d 957 (1961). It does not appear that the Court of Appeals in that case passed upon the continued vitality of its *Boston Mutual* decision.

where this seems preferable to arbitration. The grievance machinery is the institutional form established to facilitate this process. It succeeds to the extent that it produces voluntary settlement of disputes short of arbitration.

The traditional form of grievance procedure is a series of "steps" in which the parties discuss and try to settle their disputes at successively higher levels of responsibility. The first "step" may be totally informal, usually an oral conversation between the complaining employee and his foreman. If the dispute is not resolved at this step, it will be advanced to the next step—involving higher-level management and union representatives—and so on up the grievance ladder from step to step. The final step is arbitration.

The Interscience agreement, because it covers a relatively small and contiguous group of employees, has a simpler machinery than most. It contains only three steps: *First,* an oral conference between the affected employee, a union steward, and the employee's supervisor; *Second,* submission of a written grievance, discussed by the Union Shop Committee and an officer of the employer; and *Third,* arbitration. In larger companies, there may be as many as four or five grievance steps—involving progressively higher-level representatives of both union and management—before the final arbitration step.

Because the grievance machinery is fairly complex, and because the number of grievance disputes may be large, the parties in their agreement seek to establish procedures which will guide grievances through the steps. Thus a typical agreement will specify the manner in which grievances are to be initiated, the form of the written grievance, time limits for both parties in processing the grievance, forms for management to reply to the grievance, and so on. Similarly, different types of grievances may call for different treatment. Thus agreements frequently contain different procedures for "individual" and "group" grievances, or expedited procedures for discharge grievances (which have more volatile poten-

tialities). The number of specific procedural details in the average agreement is enormous, and the variety of details from agreement to agreement is virtually infinite.

The vast majority of grievances are processed strictly in accordance with the governing procedural rules. But sometimes one party or the other departs from some aspect of the applicable procedures. These departures may be for good reasons or bad.

Departures are sometimes the result of plain negligence. Other times, they stem from the ignorance or inexperience of the employee, or of his union representative who often is an ordinary worker in the plant. Sometimes a departure is both intentional and desirable. The procedures, after all, are means to an end: the voluntary resolution of grievance disputes. They are designed to accommodate the ordinary, day-to-day grievances. But when extraordinary disputes arise for which the procedures are not adapted, the parties address their attention to settling the dispute, not to complying with procedures inappropriate for that purpose. Thus a particularly volatile dispute may require quicker solution than the procedures would allow; or the nature of a dispute may compel immediate solution by "top level" personnel, without spending time on the lower-level grievance steps.

What happens when a party deviates from prescribed procedures? Usually, the departure is ignored, and the parties continue through their grievance machinery as though it had not occurred.[12] Occasionally, however, one party resists arbitration of a grievance on the ground that the other has departed from the procedural rules. It then becomes neces-

[12] In *American Manufacturing*, for example, there were substantial departures from procedural rules in processing the grievance. Yet the Company, though it took its "substantive arbitrability" defense to Court, never raised any "procedural" defense. Record, *Steelworkers v. American Manufacturing Co.*, October Term, 1959, No. 360, pp. 7, 20-25, 65-66.

sary to decide whether a departure has in fact occurred; whether it is a "good" or "bad" departure; and whether the consequence of the departure is to be loss of the right to arbitrate the grievance. But who is to decide these questions? That is the issue now before this Court.

In deciding whether courts should involve themselves in resolving procedural defenses, or—more precisely—whether it can reasonably be assumed that the parties to collective bargaining agreements intend them to, this Court must examine the courts' competence to do the job. Accordingly, we turn to a description of the kinds of procedural questions which arise and the considerations implicit in their resolution, and weigh the respective abilities of arbitrators and courts to decide them.

B. The Problems Which Arise Concerning Administration of the Grievance Machinery, and the Competence of the Courts to Resolve Them.

As we later demonstrate, parties usually commit their procedural disputes to their arbitrators. Therefore any understanding of the types of problems which arise, and the way they are resolved, necessarily must be acquired from a review of arbitral opinions.

The arbitrator, when a procedural defense is presented, performs a single task—his normal task—interpreting and applying the collective bargaining agreement. In performing that task, he considers four questions: (1) has there been a deviation from contractual procedures; (2) is the deviation one which may be "excused"; (3) if not excused, is the consequence of the deviation to be loss of the grievance; (4) even if the grievance is lost on procedural grounds, will it effectuate application of the agreement to render an advisory opinion on the merits, to guide the parties in similar situations in the future? We discuss each of these questions in turn.

1. *Has there been a deviation from contractual procedures?*

The first step in resolving any procedural defense is determining what the grievance machinery provides. This often is no simple matter. A few examples of the interpretive problems which arise will suggest the difficulties.

• Did the parties intend their procedural rules to be binding, or merely "hortatory"? [13]

• Many agreements provide that a grievance must be initiated by or on behalf of an "employee." Should a grievance be arbitrated if initiated by a former employee on leave of absence? [14] A former employee who was promoted to a supervisory position and then fired from that post in a reduction in force? [15] An employee who quit his job after filing the grievance? [16] One who quit before filing the grievance? [17] An employee who resigned in the face of a company threat to fire her? [18] The widow of a deceased employee? [19]

• Other agreements provide that "individual" grievances must be initiated by the affected employee, but that "general interest" grievances, or "group" grievances, or those affecting the union "as such," may be initiated by the union without the consent of the affected employee. What considerations govern the determination whether a grievance is "individual," so that it may be processed only with the af-

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[13] *Southern California Edison Co.*, 18 LA 662 (Warren); *Metropolitan Body Co.*, 15 LA 207 (Conn. St. B'd. of Arb.).

[14] *Wheeling Steel Corp.*, Pike & Fischer, Steel Arbitration Digest 15:505 (Shipman) [hereinafter cited as "Steel Arb. Dig."].

[15] *Tin Processing Corp.*, 16 LA 48 (Emery); *American Chain & Cable Co.*, Steel Arb. Dig. 15:505 (Valtin)

[16] *Tennessee Coal & Iron Division, U. S. Steel Corp.*, Steel Arb. Dig. 15:505 (Garrett).

[17] *Cf. Mead Corp.*, 19 LA 390 (Marshall) *with Hudson Tool & Machine Co.*, 21 LA 431 (Kahn).

[18] *Pan American World Airways Inc.*, 18 LA 627 (Allen)

[19] *United States Steel Corp.*, 34 LA 306 (Sherman).

fected employee's consent, or "general," so that it may be processed by the union without the employee's consent?[20]

• Implicit in every agreement is an understanding that a grievance dispute, once settled, may not be reinstituted absent exceptional circumstances. Questions which arise frequently include: was there a settlement of the dispute?[21] Did the persons who settled have authority to bind the parties?[22] Is the scope of the settlement coterminous with the scope of the grievance?[23] What circumstances would justify reinstituting the grievance?[24]

• Many contracts provide that grievances must be filed within a specified time. Does the time limit start to run when the company announces an objectionable course of conduct, or when it actually initiates the conduct?[25] If the grievance is filed after announcement of a course of conduct, but before its initiation, is it premature?[26] Does the time limit run from the date of occurrence of the protested action, the date the union learns of the occurence, the date

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[20] *Morton Salt Co.*, 31 LA 979 (Howlett); and cases cited therein; *Champion Co.*, 24 LA 390 (Lehoczy).

[21] *W. E. Caldwell Co.*, 28 LA 434 (Kesselman); *Stackpole Carbon Co.*, 30 LA 1028 (Brecht).

[22] *American Sugar Refining Co.*, 24 LA 66 (Reynard); *Kendall Cotton Mills*, 24 LA 684 (Dworet); *Bethlehem Steel Corp.*, 30 LA 967 (Valtin).

[23] *Babcock & Wilcox Co.*, 24 LA 541 (Dworkin); *Republic Steel Corp.*, 25 LA 437 (Platt); *Lion Oil Co.*, 25 LA 549 (Reynard); *Eagle-Picher Corp.*, 27 LA 87 (Springfield).

[24] *Tennessee Coal, Iron & Railroad Co.*, 7 LA 378 (Blumer).

[25] *International Harvester Co.*, 13 LA 646 (Seward); *Timken Roller Bearing Co.*, 28 LA 259 (Stouffer); *Consolidated Vultee Aircraft Corp.*, 4 LA 24 (McCoy); *Southern California Edison Co.*, 18 LA 662 (Warren); *North American Aviation Co.*, 20 LA 789 (Komaroff); *Square D Co.*, 25 LA 225 (Prasow); *Convair*, 26 LA 622 (Komaroff).

[26] *International Harvester Co.*, 13 LA 646 (Seward); *Color Corp. of America*, 25 LA 644 (Lennard); *Stackpole Carbon Co.*, 30 LA 1028 (Brecht).

the affected employee learns of the occurrence, or the date the union and/or employee should have known of the occurrence?[27] Where the grievance objects to a "pattern" of conduct, does the time limit run from the first occurrence or the last?[28] How are the time limits calculated; *e.g.*, does "5 days" mean 5 calendar days or 5 working days; does "5 working days" mean 5 days on which the plant operates, 5 days on which a substantial portion of the plant operates, 5 days on which the affected employee's department operates, or 5 days on which the affected employee's job operates?[29] Are the time limits satisfied by oral presentation of the grievance, although not reduced to writing until later?[30] Is timeliness measured as of the date the grievance is mailed to the company, or the date received?[31]

It is clear that resolution of these kinds of detailed procedural questions, even more than substantive questions, requires a familiarity with practices at the plant, a knowledge and understanding of the way the grievance machinery is administered, and an appreciation of the proper role which procedures are intended to play in resolving grievance disputes.

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[27] *International Minerals & Chemicals Co.*, 3 LA 405 (Dwyer); *Torrington Co.*, 13 LA 323 (Conn. St. B'd. of Arb.); *North American Aviation Co.*, 17 LA 715 (Komaroff); *Republic Steel Corp.*, 24 LA 141 (Platt); *Anco Manufacturing Corp.*, 24 LA 268 (Holly); *Thomas D. Richardson Co.*, 25 LA 859 (Brecht); *Dayton Malleable Iron Co.*, 27 LA 179 (Warns); *Foundry Equipment Co.*, 28 LA 333 (Volcoun).

[28] *Pacific Mills*, 14 LA 387 (Hepburn); *Cherry Burrell Corp.*, 17 LA 168 (Updegraff); *Republic Steel Corp.*, 27 LA 262 (Platt); *American Suppliers Inc.*, 28 LA 424 (Warns); *U. S. Rubber Co.*, 28 LA 704 (Livengood).

[29] *Pacific Mills*, 14 LA 387 (Hepburn); *Chrysler Corp.*, 11 LA 732 (Ebeling); *Bauer Bros.*, 15 LA 318 (Klamon); *Republic Oil Refining Co.*, 15 LA 640 (Ralston).

[30] *Republic Steel Corp.*, Steel Arb. Dig. 15:513 (Stashower); *American Smelting & Refining Co.*, 29 LA 262 (Ross); *Autocar Co.*, 13 LA 266 (Abernold); *Ironrite, Inc.*, 28 LA 398 (Whiting).

[31] *Jones & Laughlin Steel Corp.*, Steel Arb. Dig. 15:515 (Cahn).

Occasionally, of course, the difficulty of the question may be camouflaged by the apparent clarity of the agreement's language. For example, consider the following "clear" provision:

> "There is no responsibility on the Company to accept for adjustment or to adjust a grievance which is presented after seven (7) days from the date of the occurrence which is the basis of the grievance."

If a grievance is filed later than seven days, is the union entitled to process it to arbitration over the company's objection? The courts would be quick to say "No." *Cf. Grocery & Food Products Employees* v. *Thomson & Taylor Spice Co.*, 214 F. Supp. 92 (N. D. Ill. 1963). But to an industrial relations expert, this provision may have an entirely different meaning. Thus, a company official who negotiated the above-quoted provision explained its meaning as follows:

> "This seven-day limitation that we have here for filing a grievance is intended primarily to push the guy into doing it faster, that's all, to keep him from sitting there and stewing on it. It is not intended in the broad sense to be a precluder or to eliminate grievances or to let a guy technically get behind the 8-ball so he can't grieve. We don't like that." (Quoted in *Southern California Edison Co.*, 18 L. A. 662, 664).

The instant case is another example of seemingly clear language which has an altogether different meaning to one familiar with industrial relations. The Interscience agreement seems to state, unequivocally, that every grievance is to be initiated by an oral conversation between the affected employee and his supervisor (R. 27). That step was wholly unsuited to this situation, of course, where the union was seeking to discuss the transfer of employees, together with their seniority and benefit credits, upon a forthcoming trans-

fer of operations from one plant to another. The supervisors obviously had no control over the problem, and the processing of separate grievances for each employee would have been a waste of time and effort. The only sensible procedure was the one followed by the union: immediately contacting top-level management, and engaging in full discussion of the problems involved. Nonetheless the district court, finding the language of the agreement clear, refused to order arbitration because "each individual employee" failed to follow "the procedures set up by the contract for resolution of those individual grievances" (R. 55).

But the agreement's meaning is not so plain as the district judge thought, and his result is at variance with the relevant arbitration decisions. For arbitrators consistently hold that the lower steps of the grievance procedure, established to deal with every-day problems, do not apply to grievances against top-level management decisions over which subordinates have no control. See, *e.g.*, *Manion Steel-Barrel Co.*, 6 L. A. 164; *Mercury Engineering Corp.*, 14 L. A. 1049; *Todd Shipyards Corp.*, 27 L. A. 153; *Evert Container Corp.*, 30 L. A. 667. As the arbitrator in *Manion* stated:

> "[I]t is well recognized in the practice of industrial relations that certain disputes of a general nature . . . can only be resolved at a high union-management level . . ." (6 L. A. at 168)

The district judge's treatment of this case is understandable. He viewed the agreement as if it were the ordinary commercial contract which comes before him, and enforced its letter accordingly. He could not be expected to know the "practice of industrial relations" which guides arbitrators in solving these problems. It is precisely for that reason that parties to labor agreements look to arbitrators, not courts, for interpretation of their procedural rules, a task

which inevitably requires an appreciation and "feel" for the interests and practices involved.

> "[T]he parties' objective in using the arbitration process is primarily . . . to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *Warrior & Gulf*, 363 U. S. at 582.

2. *Is the deviation "excused"?*

Since procedural rules are merely means to an end—the settlement of grievance disputes—arbitrators have found in most agreements implicit recognition that there are valid "excuses" for literal noncompliance with procedural rules, where punishment for noncompliance would be inconsistent with the ends the procedures are intended to serve. The types of "excuses" offered for noncompliance are numerous and varied. For example:

> —The company waived the defense by not raising it prior to arbitration.[32]
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> —The company is estopped, because in the past it has permitted similar deviations without objection.[33]
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> —The procedural rule is stated ambiguously, and the union's interpretation (though ultimately decided by

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[32] *McLouth Steel Corp.*, 24 LA 761, 763 (Bowles) (Procedural questions, "if not raised in prior steps, are ordinarily considered to have been waived if first presented in arbitration"); *Cherry Growers, Inc.*, 24 LA 232 (Howlett); *Kroger Co.*, 24 LA 593 (Slavney); *American Smelting & Refining Co.*, 24 LA 857 (Ross); *Flexonics Corp.*, 24 LA 869 (Klamon); *American Airlines*, 27 LA 448 (Wolff); *Ironrite, Inc.*, 28 LA 398 (Whiting); *Republic Steel Corp.*, 30 LA 301 (Platt).

[33] *Ironrite, Inc.*, 28 LA 398 (Whiting); *Lone Star Steel Co.*, 30 LA 519 (Kelliher).

the arbitrator to be wrong) was reasonable at the time.[84]

—The employee was on an extended absence from the plant when the grievance should have been filed.[85]

—The employee did not understand English, and did not realize he had been given a discharge notice.[86]

—The company submitted an engineering report which the union could not analyze or understand within the time limits.[87]

—The company representative was ill or absent on the day the grievance was due to be filed with him.[88]

—The parties were inexperienced, or unfamiliar with the procedural rules.[89]

—The employer violated the procedural rules, too.[90]

Whether such an excuse should be accepted in a given case depends upon a delicate balancing of the several interests which inhere in the agreement: on the one hand, the desire for an effective grievance machinery; on the other hand, the desire that grievance disputes be resolved and that labor conflict be avoided, and the realization that

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[84] *Bethlehem Steel Co.*, 7 LA 276 (Simkin); *Thomasville Chair Co.*, 8 LA 792 (Waynick).

[85] *Okmer Corp.*, 5 LA 278 (Lehoczy) (in Navy); *Hayes Manufacturing Corp.*, 14 LA 970 (Platt) (on layoff); *Foundry Equipment Co.*, 28 LA 333 (Volcoun) (in mental hospital).

[86] *Thomas D. Richardson Co.*, 25 LA 859 (Brecht).

[87] *Stackpole Carbon Co.*, 30 LA 1028 (Brecht).

[88] *Standard-Coosa-Thatcher Co.*, 4 LA 79 (McCoy); *Minneapolis Plastic Molders Co.*, 10 LA 570 (Rottschaefer).

[89] *Bethlehem Steel Co.*, 17 LA 7 (Selekman); *Carnegie-Illinois Steel Corp.*, 15 LA 794 (Sturgis); *Smith-Haigh-Lovell Co.*, 20 LA 47 (Conn. St. B'd of Arb.).

[90] *Bethlehem Steel Co.*, 3 LA 742 (Dodd); *Anchor Rome Mills*, 9 LA 595 (Biscoe); *Bethlehem Steel Co.*, 19 LA 186 (Killingsworth).

the grievance machinery is attended not by lawyers, but by workingmen.

This balancing requires a familiarity and understanding of the industrial relations scene which courts simply cannot provide. One example, we believe, will suffice to demonstrate this fact.

In *Lone Star Steel Co.*, 30 L. A. 519, 2,500 employees engaged in a wildcat strike. The company purported to discharge them all, and then engaged in a series of "on again-off again" communications to the employees designed to weaken the strike and entice them back to work. The union sought to meet with the company to discuss the overall situation, but the employees, confused by the company's communications, did not seek hearings on their individual "discharges" within the time limits specified in Section 8 of the agreement. Arbitrator Kelliher excused the failure of the employees to comply with the time limits for seeking a hearing:

> "This Arbitrator cannot construe the language of Section 8 in a vacuum. He must consider it in the light of the facts then existing. At no point in the [arbitration] hearing, although challenged to do so, did the company show how realistically two thousand five hundred (2,500) hearings could have been held within any reasonable period of time. This would have been a totally unrealistic solution to getting the employees back to work and producing for the company. It would have involved a time extending over several weeks or possibly months.
>
> ". . . Considering all the evidence, the Arbitrator cannot find a forfeiture of seniority [i.e. employment] rights on the grounds of untimeliness" (30 L. A. at 523).

Could a court have been trusted to reach the right result on this procedural question? Would it have recognized that

the company's purported "discharge" of the employees was, at the time, really a "scare" device for "getting the employees back to work and producing for the company"? And, failing this, would it have recognized that the company, by engaging in tactics designed to confuse the employees and scare them back to work, had itself subordinated any interest in literal compliance with the grievance procedure to its overriding interest in ending the strike?

3. *What is the consequence of unexcused noncompliance with procedural rules?*

Noncompliance with procedural rules, if unexcused, is itself a "breach" of an obligation under the collective bargaining agreement. Like other breaches, an appropriate remedy is called for. But it is not at all self-evident that the remedy for every unexcused departure from procedural rules should be foreclosure of the grievance from arbitration, *i.e.* loss of the grievance on the merits.

It must be remembered that the union's grievance alleges that the employer has violated the agreement. The union's procedural deviation is a second, counter-breach. A solution which remedies *both* breaches best effectuates the purposes of the agreement. By contrast, a remedy which punishes the union's breach by totally absolving the employer from responsibility for *his* breach may be totally unjust in the circumstances.

For these reasons, arbitrators strive to fashion remedies which harmonize the interests of all the parties. For example, if a grievance is filed late, arbitrators frequently reduce the amount of back pay awarded, to absolve the employer of financial responsibility for such period as he might have relied to his detriment on the failure to file a grievance.[41]

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[41] *Stackpole Carbon Co.*, 30 LA 1028 (Brecht); *American Suppliers, Inc.*, 28 LA 424 (Warns); *Republic Steel Corp.*, 27 LA 262 (Platt); *Pacific Mills*, 14 LA 387 (Hepburn).

Resolution of procedural defenses by courts could have only the most unwholesome effects upon the arbitral process. For courts do not share the arbitrator's flexibility in fashioning remedies for procedural noncompliance. A court's power ends when it orders or denies arbitration. It must punish procedural deviations, if at all, by denying arbitration of the underlying grievance.[42] The powers at its command thus are clumsy instruments with which to accomplish the delicate balance of parties' interests required of any remedy for breach of a collective bargaining agreement.

The skill and flexibility which arbitrators can bring to bear in formulating remedies for breaches of collective bargaining agreements are principal reasons why parties choose them, rather than courts, to settle their disputes. "When an arbitrator is commissioned to interpret and apply a collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution to the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." *Enterprise Wheel*, 363 U. S. at 597.

4. *Should the Merits of the Grievance be decided even though the right to relief is lost due to procedural noncompliance?*

Resolution of a grievance provides not only relief to those injured by improper management action, but also an adjudication of the propriety of management's action for the guidance of the parties in the future.

It does not follow, just because the right to relief is lost through procedural noncompliance, that adjudication of the merits is foreclosed as well. The parties have contracted

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[42] But see *Local 205* v. *General Electric Co.*, 172 F. Supp. 53, 61-62 (D. Mass. 1959), in which the court, ordering arbitration despite "obvious delay" in the filing of a grievance, took upon itself the power to determine "an appropriate cut-off date" for retroactivity of back pay.

for an "interpretation" of the agreement.[43] That interpretation may be valuable, even though no relief will be forthcoming.

The industrial plant is a community which lives from day to day, with recurring problems. The arbitrator presented with a volatile dispute may conclude that there is a need for an interpretation, so that the parties may plan their future conduct with a fuller understanding of the "law" governing their relationship.

Certain practical considerations also underlie such action. Denial of a grievance on procedural grounds may cause unrest in the plant, for the underlying dispute remains unsettled. But if the arbitrator shows that his decision on the merits would have been favorable to the employer anyway, he stills the frustration which otherwise might develop. Accordingly, as might be expected, arbitrators render "advisory" decisions on the merits most often when these decisions are favorable to the employer.[44]

The rendering of a decision on the merits in these circumstances can be a very desirable phenomenon. But it is a service which courts, if they pass upon procedural questions, cannot provide. If they conclude that the union has "lost" the grievance because of procedural deviation, their powers are at an end. They must deny arbitration.

We have shown that courts, if they attempt to pass upon procedural defenses, cannot adequately resolve them. They lack the intimate knowledge of industrial relations necessary to determine whether a "breach" has occurred and, if so, whether it is "excused"; they lack the flexibility to formu-

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[43] Arbitrators frequently have found that the grievance procedure contemplates "declaratory judgment" grievances. See, *e.g. Wheeling Steel Corp.*, Steel Arb. Dig. 15:556 (Shipman); *Worthington Corp.*, 30 LA 545 (Turkus).

[44] See, *e.g., North American Aviation Co.*, 16 LA 489 (Komaroff); *North American Aviation Co.*, 20 LA 789 (Komaroff); *St. Joseph Lead Co.*, 28 LA 721 (Klamon); *R. H. Osbrink Co.*, 28 LA 88 (Phelps).

late appropriate remedies for unexcused breaches; and they lack the power to provide adjudication on the merits where the right to relief has been lost. But the courts' lack of competence is not the sole debility which dissuades parties from committing procedural disputes to them. Of equal importance is the incompatibility of the slow-moving machinery of the judicial process with the need for speedy resolution of grievance disputes.

C. The Slowness of the Judicial Process Is Incompatible With the Need for Speedy Resolution of Grievance Disputes

The essential attribute of any grievance machinery is that it provide speedy resolution of grievance disputes. The inclusion in virtually every collective bargaining agreement of "time limits" for processing grievances demonstrates the parties' preoccupation with the need for rapid adjustment. The hotly contested grievance which lingers unresolved is a festering sore in the relations between the parties, which may have a mounting propensity to erupt into precisely the kind of economic conflict the grievance machinery is intended to avoid. Delay is anathema to the very spirit of peaceful cooperation which motivates parties to provide for arbitration of their grievance disputes.

Consider, for example, the dispute involved in *Lone Star Steel Co.*, 30 L. A. 519, and what might have happened if the employer had taken its procedural defense to court. In that case the company purported to discharge 2,500 workers for engaging in a wildcat strike. The union filed a grievance in the third step of the grievance procedure, claiming, *inter alia*, that discharge was too severe a penalty. The grievance was processed to arbitration within a month and a half. The company raised before the arbitrator a "procedural" defense—that separate grievances should have been filed by each employee in the first step. The arbitrator rejected the "procedural" defense, concluding that the mass

discharge was a "top-level" management decision and that therefore the lower steps of the grievance procedure were inapplicable.[45] He then decided, on the merits, that the company was entitled to discharge the "instigators" of the strike, but that it could impose only lesser discipline upon the remaining participants, and ordered them reinstated. Had the company chosen to take its "procedural" defense to court, instead of submitting it to the arbitrator, absolute chaos might have resulted. The district court might well have ruled, as did the district court in the instant case, that the union could not arbitrate because separate grievances were not filed in the first step by each of the 2,500 individuals. An appeal would have been necessitated. The total time elapsed between discharge and ultimate submission to the arbitrator could well have been years. (The present lawsuit is well into its second year.) Meanwhile 2,500 employees would remain injured, convinced (correctly) that they had been improperly discharged. This hardly would be conducive to the peace which parties hope to achieve when they create an arbitration machinery.

The parties to collective bargaining agreements do not contemplate multiennial delays in the processing of grievances. But judicial resolution of procedural defenses would have precisely that effect.[46]

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[45] See cases cited *supra*, p. 34.

[46] The company, in its brief (p. 55), argues that the employer intent upon delaying arbitration can in any event succeed by claiming that he has not agreed to arbitrate the subject matter of the grievance. This is true. But the rules governing "substantive arbitrability," enunciated by this Court in *American Manufacturing* and *Warrior & Gulf*, leave few instances in which an employer will have *good faith* doubts as to the arbitrability of a particular subject matter. And most employers realize that *bad faith* resistance to arbitration is poor labor relations policy. By contrast, the complexity of "procedural" questions is such that employers in good faith frequently are unable to predict the correctness of their defense. The temptations to submit such questions to the courts thus would be more frequent, and the consequent delays in the arbitral process more serious.

D. In Practice Parties to Collective Bargaining Agreements Submit Their Procedural Disputes to Their Arbitrators, Not to the Courts.

We have described a number of factors which would be expected to impel parties to submit "procedural" disputes to their arbitrators, rather than the courts. And actual experience demonstrates that parties do, in fact, refer such questions to their arbitrators. There have been only a few dozen cases in which employers have taken procedural defenses to court, as compared to literally thousands of cases in which employers have submitted such questions to their arbitrators.[47] Indeed, the intentions of the labor-management community are nowhere better expressed than in response to the decisions of the Courts of Appeals for the First and Seventh Circuits, in 1958 and 1959 respectively, holding that procedural questions are for the courts.[48] Whatever may have been the expectations of parties in these circuits theretofor, they were invited unequivocally to bring their procedural defenses to court, and were assured that they would be resolved there. Yet those invitations have gone virtually unaccepted. In the five years since *Boston Mutual*, only one case has been reported in which an employer submitted a strictly procedural defense to a federal court in the First Circuit.[49] In two cases, procedural defenses were added as "make weights" to substantive arbitrability

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[47] Some hint of the number of procedural questions presented to arbitrators can be garnered from the several volumes of BNA's "Labor Arbitration Cumulative Digest and Index," under key numbers 93, 94.5-94.6, and 118.305 and Steel Arb. Dig. ¶ 15. These constitute only a small portion of the total, however, for the vast majority of arbitrators' awards are unpublished.

[48] *Boston Mutual Life Insurance Co.* v. *Insurance Agents*, 258 F. 2d 516 (1st Cir. 1958); *Brass & Copper Workers* v. *American Brass Co.*, 272 F. 2d 849 (7th Cir. 1959), *cert. denied*, 363 U. S. 845 (1960).

[49] *Local 201* v. *General Electric Co.*, 171 F. Supp, 886 (D. Mass. 1959).

defenses.[50] In the four years since *American Brass*, one procedural defense has been submitted to a federal court in the Seventh Circuit.[51] And all the while hundreds upon hundreds of procedural defenses within the jurisdiction of these circuits have been submitted to arbitrators.[52]

E. Conclusion

We return to our initial question: how shall the courts respond when procedural disputes are brought before them? Shall they venture into the merits of such disputes? If they do, and recognizing the inability of courts to bring the arbitrator's tools of analysis to the problem, we must expect results like that of the district court in this case; an interpretation linguistically sound but industrially foolish, and a flat rule of law that any deviation by the union from procedures, once found, forecloses the right to arbitrate the grievance—in other words, that the union and the affected employees lose the underlying grievance.

Nor will the problems be one-sided. For management also frequently violates procedural rules, particularly in discharge cases.[53] And in some circumstances arbitrators have held that management thereby loses the right to an adjudication of the merits of its conduct, *i.e.*, that the union *wins* the grievance because of the procedural deviation.[54] If the

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[50] *Local 205* v. *General Electric Co.*, 172 F. Supp. 59 (D. Mass. 1959); *General Tire & Rubber Co.* v. *Local 512*, 191 F. Supp. 911 (D.R.I.) aff'd 294 F. 2d 957 (1st Cir. 1961).

[51] *Grocery & Food Employees* v. *Thomson & Taylor Spice Co.*, 214 F. Supp. 92 (N.D. Ill. 1963).

[52] See n. 47, *supra*.

[53] See cases cited *infra*, n. 54, and cases digested under key number 118.305 in BNA, Labor Arbitration Cumulative Digest and Index.

[54] *Hayes Mfg. Corp.*, 17 LA 412, 417-18 (Platt); *Vaughn Mill Works Co.*, 11 LA 296 (Haughton); *Baldwin-Lima-Hamilton Corp.*, 19 LA 177 (Day); *U. S. Hoffman Machinery Corp.*, 22 LA 649 (Hazell); *Trans World Airlines, Inc.*, 24 LA 95 (Gilden); *Kohler Bros. Sand & Gravel Co.*, 25 LA 903 (Anderson); *National Carbide Co.*, 27 LA 128 (Warns); *United States Steel Corp.*, 29 LA 272 (Babb).

courts were to take over from the arbitrators the job of resolving procedural disputes, it would seem to follow that unions would be entitled to judicial enforcement of their grievances upon a showing that management, by violating procedures, had lost the right to defend its conduct before an arbitrator.

Do any of these results make sense? Could the parties possibly intend them? When they agree that all disputes over "interpretation or application" of their agreement are to be arbitrated, repose in an arbitrator sole authority to settle such disputes, and surrender the use of economic force as a means of settlement, does it effectuate their intentions for courts to deny arbitration? Is it not reasonable to assume that unless they specifically say otherwise they intend that procedural questions be submitted to the arbitrator together with the merits, so that he may determine the dispute taking all relevant factors into account?

Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U. S. C. §173(d), states: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . ." As this Court has recognized, "That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *American Mfg.*, 363 U. S. at 566.

The parties have agreed that the matters the union seeks to arbitrate are to be resolved, if at all, by an arbitrator. "In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for" (*Id.* at 568). "Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement" (*Id.* at 567).

As Professor (now Solicitor General) Cox stated, "Using

the technical language of the law, I suggest that the conventional arbitration clause limiting the arbitrator to disputes concerning 'interpretation and application' of the contract reserves the right to a judicial determination upon whether the arbitrator has jurisdiction over the subject matter but that *all other questions—procedural, jurisdictional or substantive—are solely within the power of the arbitrator to determine.*" Cox, *Reflections upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1511 (1959), emphasis supplied.

The agreement in this case contains the "conventional" arbitration clause, committing to arbitration all disputes involving the "interpretation or application" of the agreement (R. 27). The parties have not manifested an intent that procedural defenses be adjudicated by the courts. Accordingly, those questions "are solely within the power of the arbitrator to determine."

CONCLUSION

For the reasons stated, the decision of the court below should be affirmed.

Respectfully submitted,

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